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No. 93-1082

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOHN A. MORRISON, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

Respondent, Mobil Oil Corporation (Mobil), directs the Court's attention to the Tenth Circuit's decision in *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528 (1993) (*Raymond I*), for a factual description of Mobil's conduct in amending its pension plan in 1984. *Brief in Opposition* at 3 n.4. Petitioners join in this suggestion. In *Raymond I*, the Tenth Circuit agreed with the Fifth Circuit that Mobil " 'did not notify its employees of the waiver provision until well after expiration of the six-month window.' " 983 F.2d at 1530, quoting *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1213 (1992). In fact, when Mobil finally did announce the waiver provision in October 1985, even then it did not reveal that the waiver was in effect *before* the six-month window closed in December 1984. Petitioners "retired" on January 1, 1985, never knowing of their right to apply for the

waiver of the higher lump sum eligibility test nor that the Retirement Equity Act of 1984 (REA) had grandfathered their right to the lump sum benefit under the original eligibility test. *See Raymond I*, 983 F.2d at 1531-32 n.6.

Mobil's argument that "limitations periods begin to run at the time the adverse employment decision 'was made and *communicated*' to employees" is telling. *Brief in Opp.* at 6 (italics added) (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980)). In this case, the adverse employment decisions by Mobil were the willful *concealments* of the existence of the waiver provision and of the timing of its adoption. By definition, fraudulently concealed information is uncommunicated information. The discriminatory act alleged here was never communicated to the employees; rather, it was discovered by them, thus implicating the federal discovery rule.

Mobil argues that "every constructive discharge claim includes elements of nondisclosure." *Brief in Opp.* at 10. Of course, an employer will always attempt to conceal discriminatory *animus*. Petitioners do not argue that nondisclosure of discriminatory *animus* should toll the limitations period. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). The concealment and misrepresentation of the factual and legal status of an employee's rights, however, is a different matter. "To the extent that such efforts succeed, they postpone the [limitations period] by preventing the plaintiff from discovering that he is a victim of a fraud." *Id.* An older employee who is a victim of fraud is not constructively wronged. Logically, an older employee can prove either that he felt compelled to retire or that he was deceived into retiring, not both.

Because this is an action for fraud, Mobil's analysis of the law of equitable tolling is misconceived. As even the Tenth Circuit itself has recently recognized, in "fraud actions, federal equitable tolling principles provide that

'where a plaintiff has been injured by fraud . . . the bar of the statute [of limitations] does not begin to run until the fraud is discovered.' " *Shields v. Boettcher Inv. Corp.*, 1993 WL 482902, at *2 (10th Cir. 1993) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392 (1946)).[1] To avail themselves "of this exception to the period of limitations," petitioners "must show that [they] were 'without fault or want of diligence' in discovering the fraud." *Id.* *See also Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 (10th Cir. 1980) ("[T]he limitations period begins to run when the aggrieved party discovers, or should have discovered by the exercise of reasonable diligence, the facts constituting the fraud") (citing *Holmberg*).[2]

Under *Holmberg* and the federal discovery rule, it is the diligent discovery of *the fraud* which begins the period of limitations, even when the discovery is made after the occurrence of other adverse conduct which creates a subjective feeling of injury. Fraudulent injury is always wrongful, whereas not all "injury is due to wrongdoing." *Cada*, 920 F.2d at 451. In the present case, the Tenth Circuit ignored this principle. This Court should decide whether, under the tolling and accrual principles, a fraud which is the efficient cause of injury and which makes the injury wrongful may go uncontested merely because it was

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[1] *Shields* is unpublished. The Tenth Circuit, however, permits citation of unpublished opinions if they have persuasive value on a material issue. General Order of November 29, 1993, U.S. Order 93-44 (suspending 10th Cir. Rule 36.3 which prohibited citation of unpublished opinions).

[2] Mobil cites *Heideman v. PFL, Inc.*, 904 F.2d 1262 (8th Cir. 1990), and other cases, for the proposition that "attempts to conceal are irrelevant for limitations purposes." *Brief in Opp.* at 7. However, in *Heideman* the plaintiff "knew 'the facts constituting the fraud' when he was discharged." 904 F.2d at 1268 n.5. In any event, are successful concealments irrelevant under *Holmberg*? *See also Irwin v. Veterans Admin.*, 498 U.S. 89, 96 (1990) (noting that tolling principles apply where the plaintiff has been "tricked" by the defendant's misconduct).

successfully concealed for four years—longer than the limitations period applicable to ordinary ADEA claims.[3]

The issue presented to this Court is whether federal courts, assuming diligence by the plaintiff and absent a statute of repose, should carve out of the federal discovery rule a safe harbor for fraud?

Mobil asserts that "many petitioners acknowledged under oath that they believed in 1984 that the [Hobson's choice] was age discriminatory." *Brief in Opp.* at 7 n.7. This is not true. The petitioners did believe that the Hobson's choice was unfair, but all believed, because of the *apparent* approval by the IRS of the pension plan amendments which created the Hobson's choice, that the pension plan changes communicated to them were legal and proper under ERISA. When an employer willfully misrepresents to its employees and plan participants that otherwise adverse pension plan changes have been formally approved by the IRS, such active deception by the employer not surprisingly will lead the employees to believe that they were not legally wronged. *See Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3rd Cir. 1993). Mobil's citation to *United States v. Kubrick*, 444 U.S. 111 (1979), therefore, is inapposite. *Brief in Opp.* at 10. *Kubrick* was not a fraud case.

Mobil conspicuously fails to defend the Tenth Circuit's unreasoned holding that the difference between a claim for constructive discharge and a claim for fraudulent discharge is "merely an 'exercise in semantics.'" *Brief in Opp.* at 8-9. How can the two claims be legally the same

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[3] The alleged fraud was the efficient cause of petitioners' injuries: Mobil affirmatively misrepresented to the petitioners that the IRS had approved the pension plan amendments which created the Hobson's choice when, in fact, the IRS had approved plan amendments which included a waiver provision obviating the Hobson's choice. The announced changes in the pension plan could not have been the proximate, *legal* cause of petitioners' injury.

if—on their merits—they can result in different outcomes? A claim for constructive injury could fail because the allegedly adverse employment decisions actually communicated to the employees were shown to be business justified, yet a claim for fraudulent injury could succeed because no alleged adverse concealments and misrepresentations can ever be business justified. *See and compare, Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 471-73 (10th Cir. 1990), *cert. denied*, 498 U.S. 898 (1990).

This is why petitioners candidly argue that federal courts should recognize a claim for fraudulent discharge for employees who are victims of fraud. If the petitioners prove, as they must, that the alleged fraud was age-discriminatory, the jury may find that Mobil deceived older employees into early retirement. That some petitioners also may have felt that it was in their best interests to retire in the face of Mobil's partial communications to them concerning their pension rights is immaterial.

Finally, Mobil's assertions that the petitioners failed to comply with the requirement that EEOC charges be timely filed is simply wrong. Upon discovery in late 1988 of the concealments of the IRS-mandated waiver provision, class representatives timely filed, in early 1989, class-wide EEOC charges alleging fraudulent discharge. Subsequently, the EEOC dismissed the charges, not as untimely, but because this fraud action was proceeding in the district court. The EEOC limitations will not bar a trial on the merits.

CONCLUSION

The petitioners respectfully request that their petition for writ of certiorari be GRANTED.

Respectfully submitted,

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